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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1458

STATE OF LOUISIANA AND THE PARISH OF CADDO,
Petitioners,

versus

GULF STATES THEATRES OF LOUISIANA, INC., ET AL.,
Respondents.

JOHN A. RICHARDSON AND GEORGE W. D'ARTOIS,
Petitioners,

versus

GULF STATES THEATRES OF LOUISIANA, INC., ET AL.,
Respondents.

Petitions for Writs of Certiorari to the Supreme Court of Louisiana

BRIEF IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Respondents respectfully pray that this Court deny the request of Petitioners that Writs of Certiorari issue to review the decisions of the Supreme Court of Louisiana, entered in these captioned and related cases on December 3, 1973, holding that, on their face, the Louisiana Criminal Obscenity Statute, La. R.S. 14:106, and the Louisiana Nuisance Statute, La. R.S. 13:4711 et seq, violated both the Louisiana Constitution and the Constitution of the United States. The Petitioners have, pursuant to Rule 23(5) of the Rules of this Court, filed a single Petition for Writs of Certiorari covering all the cases, and Respondents herein, Gulf States Theatres of Louisiana, Inc., United Artists Corporation, and Joe Gianforte, submit a combined Brief in Opposition.

CITATIONS TO OPINIONS BELOW

The opinion of the Louisiana Supreme Court in *State v. Shreveport News Agency, Inc.*, wherein the Court held La. R.S. 14:106 unconstitutional is reported at 287 So.2d 464 and is included as Appendix M. p. 174a, of the Petitioners' Application. The opinion of the Louisiana Supreme Court in *Gulf States Theatres of Louisiana, Inc., et al v. John A. Richardson and George W. D'Artois*, wherein the Court held that La. R.S. 13:4711, et seq., was unconstitutional, is reported at 287 So.2d 480 and is included as Appendix J, p. 126a, of the Petitioners' Application. The two companion cases to the above decisions, also decided on December 3, 1973, are

State v. McNutt, 287 So.2d 478, Appendix O, p. 213a, Petitioners' Application, and *State v. Gulf States Theatres of Louisiana, Inc., et al*, 287 So.2d 496, Appendix F, p. 102a, Petitioners' Application. Because the Civil Nuisance Statute La. R.S. 13:4711, adopts the definition of obscenity found in La. R.S. 14:106, Respondents in this Brief address themselves to both statutes and the impropriety of review of any of the above companion decisions of the Louisiana Supreme Court. The Civil Nuisance Statute is reproduced as Appendix A, p. 2a of the Petitioners' Application.

QUESTIONS PRESENTED

1. Whether the Louisiana Supreme Court improperly applied this Court's decision in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) when it concluded that La. R.S. 14:106, the Louisiana Criminal Obscenity Statute, was unconstitutional on its face due to overbreadth and absence of a specific definition of the conduct that is prohibited, and therefore violated both the Louisiana Constitution and the United States Constitution.

2. Whether the Louisiana Supreme Court improperly held that La. R.S. 13:4711 et seq. is unconstitutional on its face because that statute:

   (a) mandates the issuance of a temporary injunction without an independent judicial finding of probable cause;

(b) provides no standards for issuance of that ex parte injunction;

(c) provides, in a civil nuisance proceeding, for a prior restraint without notice or hearing;

(d) fails to provide for a prompt adversary hearing;

(e) fails to provide for a prompt appeal;

(f) provides for the closing of the building for one year;

(g) causes a deprivation of property without due process of law; and

(h) constitutes a prior restraint on future expressions, and thus violated both the Louisiana Constitution and the United States Constitution.

STATEMENT OF THE CASES

A. "The Stewardesses"

On June 11, 1971, the nationally released motion picture "The Stewardesses" opened at the Broadmoor Theatre in Shreveport, Louisiana. The Broadmoor is an established, first-run theatre, located in a commercial area near the Broadmoor Shopping Center on a state highway. Six members of a men's Bible class

went to the movie to "prejudge it". Thereafter, with the cooperation of the local District Attorney, they signed an affidavit purportedly reciting scenes from the film and the trial court, without ever viewing the film, signed a temporary restraining order prohibiting the further showing of the movie. The subsequent legal proceedings consumed more than *two years* during which the film was not shown.

The film was officially rated by the Motion Picture Association of America and given a rating of X which does not permit its showing to audiences below the age of seventeen years, and this rating was observed at the box office. "The Stewardesses" ran uneventfully in Shreveport for fourteen days, during which time it met wide local acceptance and was seen by over 12,000 persons. Over ninety-five percent of the comments received by the local manager were favorable. Its popularity locally was paralleled nationally for, during the summer of 1971, it was one of the top ten rated most popular motion pictures showing throughout the United States, being exhibited in first run theatres in some 180 American cities, including New Orleans, Houston, Dallas, Beaumont and Atlanta, and was seen by over 3,000,000 persons.

During a successful two-week run in Shreveport, and while it was playing to capacity audiences of persons over 18 years of age at the two (7:00 p. m. and 9:00 p. m.) daily showings, on Friday, June 25, 1971, shortly after 6:00 p. m. the theatre manager was served by a Caddo Parish Deputy Sheriff with a paper entitled "Injunction and Temporary Restraining Order and

Rule to Show Cause", which, in the name of the State of Louisiana and the First Judicial District Court, "ordered, restrained, enjoined and prohibited" defendants from "exhibiting the motion picture 'The Stewardesses'" and "from conducting the said nuisance known as the Broadmoor Theatre". This order was signed by a state district judge (Alexander) *who had not seen the movie*, on the basis of a petition and affidavit signed by the District Attorney (John A. Richardson) and an Assistant District Attorney (Charles R. Lindsay) of Caddo Parish, *neither of whom had seen the motion picture*, on the basis of alleged complaints of "numerous residents" of the neighborhood. Upon receipt of this order the manager stopped the showing of "The Stewardesses" scheduled for that night and closed the theatre. "The Stewardesses" has not been shown since that date in Shreveport.

The peremptory order and injunction served upon defendants also directed them to "show cause" at 10:00 a. m. on Wednesday, June 30, 1971, why a "final judgment of injunction" should not be rendered perpetually enjoining the exhibition of "The Stewardesses", directing the closing of the theatre for one year and the removal of all furniture, fixtures and equipment from the premises. This order was served upon defendant *Gulf States* on Monday, June 28 (two days before the rule was returnable) and upon defendant, *Greater Broadmoor*, on Tuesday, June 29, 1971, only one day before this hearing. Counsel was employed on Monday, June 28th. At the return date on Wednesday, June 30th, before another state district judge (Fleniken), defendants filed certain motions, including a plea that the

procedure utilized was unconstitutional, and a motion for a continuance, asking for a short postponement in order to allow a reasonable time to prepare their case, obtain witnesses, and offered not to show this film in the interim. All motions and the request for a continuance were denied, a trial on the rule nisi had to the end result that Judge Fleniken, who, like the District Attorney, *never viewed the film*, held it to be obscene and its showing was permanently enjoined in Caddo Parish. (The theatre was not padlocked or the furniture removed but the District Judge said that if this "type" of motion picture was ever shown again then such action would be taken.)

Subsequent legal proceedings consumed approximately two years. Upon application of Respondents herein, this Court reversed and remanded "The Stewardesses" case to the Supreme Court of Louisiana for further consideration in light of this Court's decision in *Miller v. California* and companion cases decided at 287 So.2d 496 (1974).

On remand, oral argument was heard by the Louisiana Supreme Court and that court, for the reasons assigned by it in *State v. Shreveport News Agency, Inc.*, 287 So.2d 464 (1974), *State v. McNutt*, 287 So.2d 478 (1974), and *Gulf States Theatres of Louisiana, Inc. v. John A. Richardson and George W. D'Artois*, 287 So.2d 480 (1974) reversed its previous judgment and Petitioners' suit was dismissed. That opinion is reported in June, 1973.

B. "Last Tango in Paris"

This is a civil case which originally arose as a result of the Petitioners' attempt to prevent the showing of "Last Tango in Paris" in Shreveport, Louisiana. This film, which the Petitioners in their Application label as "hard core pornography", was nominated by the Academy of Motion Picture Arts and Sciences for the awards of Best Actor of the Year (Marlon Brando) and Best Director of the Year (Bernardo Bertolucci). "Last Tango" was first shown at the Don Theatre on Friday evening, September 28, 1973. After the first showing of the motion picture, the Petitioner, John A. Richardson, District Attorney for the Parish of Caddo, and George W. D'Artois, the Commissioner of Public Safety for the City of Shreveport, Louisiana, caused a warrant to issue for the arrest of the exhibitor, Joe Gianforte and seized the print of the motion picture. Gianforte was charged with a violation of La. R.S. 14:106 and was released on $1,000 bond. Following his release Gianforte obtained another copy of the print and resumed exhibition of the film at the Don Theatre. Thereafter, on Saturday afternoon, September 29, 1973 at 5 o'clock p.m., following the exhibition of the film at 2 o'clock p.m., Petitioners John A. Richardson and George W. D'Artois obtained a second warrant for Gianforte's arrest and *seized a second copy of the motion picture print.* The Respondents herein filed a complaint for a temporary restraining order or preliminary injunction in the United States District Court for the Western District of Louisiana which was granted on September 29, 1973, prohibiting Petitioners from making future arrests or seizing additional copies of

the film. Upon the expiration of that restraining order, Respondents sought further injunctive relief from the First Judicial District Court for Caddo Parish and from the Fifth Circuit Court of Appeals for the United States, both of which denied relief. Upon petition to the Louisiana Supreme Court, that Court ordered the First Judicial District Court for the Parish of Caddo to restrain the Petitioners, John A. Richardson and George W. D'Artois, from interferring with the showing of the motion picture film "Last Tango in Paris" and from making future seizures of prints pending a judicial determination of the issues. A hearing was then held before the Hon. James E. Clark, First Judicial District Court, Caddo Parish, who concluded that the film was obscene and enjoined its exhibition. Evidence was adduced at the trial that the film was widely accepted and broke most attendance records for the Respondents in Shreveport. Respondents were then granted a Writ of Certiorari by the Louisiana Supreme Court, which reversed the trial court and held the provisions of La. R.S. 13:4711 et seq. unconstitutional. 287 So.2d 480. The Louisiana Supreme Court then denied rehearing. This Court subsequently refused to issue a stay order to the Louisiana Supreme Court.

REASONS FOR DENYING THE WRITS

I.

The Louisiana Supreme Court did not improperly apply this Court's decision in *Miller v. California* in holding that the Louisiana Criminal Obscenity Statute La. R.S. 14:106, is unconstitutional on its face. In *Miller*

this Court unambiguously *returned to the states* the issue of obscenity. Now, dissatisfied with the opinion of the highest court of this state, the Petitioners ask this Court to reverse the pronouncements of *Miller* and once again take upon itself the burdens of reviewing issues specifically relegated to the several states in *Miller*.

Rule 19(1)(a) of this Court's rules states that a general consideration in reviewing a petition for certiorari is whether "a state court has decided a federal question of substance not heretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court." Clearly, the Louisiana Supreme Court correctly interpreted *Miller* as requiring specificity of definition in obscenity statutes, either as written or as authoritatively construed, and, finding Louisiana's obscenity statute lacking in specificity, that Court further rejected the option of "authoritative construction" as foreign to the state's jurisprudence regarding statutory construction.

II.

There are adequate state grounds for the Louisiana Supreme Court's determination that La. R.S. 14:106 is unconstitutional. The Louisiana Supreme Court concluded that La. R.S. 14:106 violated "Article I, Sections 2 and 3 of the Constitution of the State of Louisiana," *State v. Gulf States Theatres of Louisiana, Inc.*, 287 So.2d 496, 497 (Petitioners' Application, Appendix F, p. 101a), as well as violating the United States Constitution. The Louisiana Constitution, Article I, Section 3,

reads: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty". The *Miller* decision mandated that prohibited *"conduct must be specifically defined by the applicable state law* as written or authoritatively construed." (Emphasis supplied.) Because it is obvious upon the face of La. R.S. 14:106 that it lacks such specificity as written, the State of Louisiana asserts that the Louisiana Supreme Court committed error in refusing to save the statute by "authoritative construction", that is, by itself *defining* the acts prohibited by the general language of the statute. The Louisiana Supreme Court expressly declined to "authoritatively construe" this statute and stressed that under the jurisprudential history of this state, and as a matter of state law, the Louisiana Supreme Court had for decades consistently rejected the notion that it had the power to "define" criminal statutes; *State v. Christine,* 239 La. 259, 290, 118 So.2d 403, 414 (1960); *State v. Vanicor,* 118 So.2d 438, 440 (1960); *State v. Truby,* 211 La. 178, 29 So.2d 758, 759 (1947); *State v. Kraft,* 214 La. 351, 37 So.2d 815, 816 (1948); or that such was desirable in any case. Thus, the Louisiana Supreme Court specifically returned that task to the Louisiana legislature. Without doubt, the intent of *Miller* in allowing states to "authoritatively construe" these statutes was to free state courts to interpret obscenity statutes so as to incorporate the constitutional criteria of *Miller,* but nothing in *Miller requires* them to do so. *Miller* did *not* intend to *force* state courts to remedy deficiencies of

definition in order to protect the constitutionality of these statutes.

III.

Many other courts have held obscenity statutes unconstitutional when tested by the principles of *Miller*. Several state statutes have been held unconstitutional in decisions subsequent to *Miller*: *United Artists Corp. v. Wright, et al*, (M.D. Ala.) ____F.Supp.____ (January 5, 1974); *Airways Theatre, Inc., et al v. Canale, et al*, (W.D. Tenn.) 366 F.Supp. 343 (November 19, 1973); *Hamar Theatres, Inc. v. Cryan*, (D.N.J.) 365 F.Supp. 1312 (July 26, 1973); *McCright v. Olson*, (D.N.Dak.) 367 F.Supp. 937 (December 17, 1973); *Sanders v. State*, 203 S.E.2d 153 (Ga. Sup.Ct., January 28, 1974); *Art Theatre Guild, Inc. v. State ex rel Rhodes*, ____SW2d____ (Tenn.Sup.Ct. February 19, 1974);[1] *State v. Wedelstedt*, 213 N.W.2d 652, (Sup.Ct. Iowa, December 19, 1973); *Stroud v. State*, 300 N.E.2d 100, (Ind. Sup.Ct., 1973); *Mohney v. State*, 300 N.E.2d 67 (Ind. Sup. Ct. 1973); *State v. Lavin*, ____ Iowa ____ (August 13, 1973, Dist.Ct. Iowa); *Commonwealth v. Horton*, (Sup. Jud.Ct. of Mass., April 23, 1974. Essentially, the argument of the Petitioners is that this Court should mandate the Louisiana Supreme Court to "authoritatively construe" the Louisiana Obscenity Statute in order to preserve its constitutionality. Such a decision would be without historical precedent in the jurisprudence

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[1]This decision was subsequent to the decision of *Art Theatre Guild, Inc. v. State ex rel Rhodes*, 469 SW2d 669, cited by the Petitioners at p. 53 of their Application. The decision cited by Petitioners was issued on July 19, 1971, approximately two years prior to *Miller*.

of this Court and would blatantly violate traditional principles of federalism and comity. This Court in *Miller* stressed: "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete *legislative efforts*. . ." 41 U.S.L.W. 4928. The logical extension of the Petitioners' argument is that this Court additionally order all other lower courts to rescue their invalid statutes by judicially adding necessary specificity and definition. That argument is especially incongruous in light of the long-standing, and much cited, position of the Louisiana Supreme Court that it has no constitutional authority to add specificity to criminal statutes of this state. Repeating that doctrine, the Louisiana Supreme Court in *State of Louisiana v. Shreveport News Agency, Inc.* stated:

> "We are not of the opinion that we are endowed with the constitutional authority to redraft Louisiana obscenity statute. Our Court may interpret a statute, but it cannot re-write a statute in order to hold it constitutional." 287 So.2d 464, 469.

And further:

> "We reject any theory that we can authoritatively construe our criminal statute regulating obscenity so as to make it constitutional under the United States Supreme Court holding in Miller v. California. It is for the legislature to design a statute or statutes which meet

> the tests and formulations set forth by that Court." *Id.* at 470.

It would be inapposite for this Court, which in *Miller* returned the issue of obscenity to the states, to now require the Louisiana Supreme Court to apply "authoritative construction", a technique contrary to its historical jurisprudence, in order to save this state's criminal obscenity statute!

As stated in the concurring opinion of Justice Tate: "*The state itself concedes that the general language of our obscenity statute does not meet this standard* [of specifically defined conduct], but urges us to reconstrue it ex post facto so as *now* to meet the *Miller standards.*" *Shreveport News Agency, Inc.*, 287 So.2d at 471 (emphasis supplied).

The technique of "authoritative construction" is again rejected in the concurring opinion of Justice Calogero:

> "Our statute is clearly not specific in describing prohibited conduct... Miller, however, in requiring specificity, apparently sanctions it, either as written or as 'construed' by the highest courts of the respective states. Therefore the State here asks us to construe Louisiana's non-specific, vague statute as prohibiting certain specified conduct.

But what, or which conduct?

* * * *

[W]e have properly concluded in our opinion that *it is not this Court's province to write an obscenity law for the State of Louisiana, but rather the State Legislatures.*" 287 So.2d at 472. (emphasis supplied)

The Petitioners argue that these conclusions demonstrate that the Louisiana Supreme Court "misinterpreted" *Miller* because that Court refused to redeem the Louisiana statute by adding missing definition and specificity. Respondents respectfully suggest that for this Court to intervene it would be required to: (a) hold that the Louisiana statute is in fact specific and satisfies the standards of *Miller* (which as Justice Tate noted, even the Petitioners did not argue) or (b) *order* the Louisiana Supreme Court to add specificity, in contradiction of and in conflict with that Court's established refusal to ever add specificity to a criminal statute and in violation of principles of federalism. Either result is untenable. The tenable result is to allow the Louisiana legislature to enact a valid obscenity statute at its next session.

IV.

The Louisiana Supreme Court properly held that the Louisiana Civil Nuisance Statute, La. R.S. 13:4711 et seq. is unconstitutional on its face. The litany of deficiencies of that statute are set out in the Louisiana Supreme Court's opinion in *Gulf States Theatres of Louisiana, Inc., et al v. John A. Richardson and George*

W. *D'Artois*, 287 So.2d 480 (Petitioners' Application, Appendix J, p. 126a). Referring once again to this Court's rule 19(1)(a), this case is inappropriate for review because the Louisiana Supreme Court has issued a decision "in accord with applicable decisions of this Court", including *Miller v. California;* and its companion cases, *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789 (1973), *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796 (1973), and *Alexander v. Virginia*, 413 U.S. 836, 93 S.Ct. 2803 (1973).

V.

The Louisiana Supreme Court's determination that La. R.S. 13:4711 et seq. is unconstitutional was further based upon adequate state grounds. That Court concluded that the Louisiana Nuisance Statute violated the Louisiana Constitution, Article 1, Section 3, which protects freedom of speech from prior restraint. 287 So.2d at 491, (Petitioners' Application, Appendix J, p. 148a). Under the provisions of La. R.S. 13:4714, once it is determined that obscenity, as a nuisance, has occurred within a building, the trial court "shall direct *the effectual closing of the building, structure, land or other place against its use for any purpose for the period of one year,* unless sooner released." La. R.S. 13:4714, (Petitioners' Application, Appendix A, p. 6a) (emphasis supplied). The Louisiana Supreme Court concluded: *"This provision has the effect of sledgehammering the printing press, the camera, the projectors, all the tools of expression in every medium, so that there can be no future expression at all for one who transgresses by crossing the line from free speech*

to obscenity upon one occasion. We can envision no more fatal defect of prior restraint. . . ." 287 So.2d at 491 (emphasis supplied), (Petitioners' Application, Appendix J, p. 148a).

VI.

The Petition for Writs of Certiorari is further without merit in that *the United States Supreme Court has consistently refused to review petitions by states against state court decisions affecting a state's obscenity laws. See, e.g., Commonwealth v. Dell Publications, Inc.*, 427 Pa. 189, 233 A.2d 840 (1967), *cert. denied sub nom; Pennsylvania v. Dell Publications, Inc.*, 390 U.S. 948, 88 S.Ct. 1038 (1968); *People v. Noroff*, 63 Cal. Rptr. 575, 433 P.2d 479 (1967), *cert. denied sub nom; California v. Noroff*, 390 U.S. 1012, 88 S.Ct. 1261 (1968); *In Re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1968), *cert. denied sub nom, California v. Giannini*, 395 U.S. 910, 89 S.Ct. 1743 (1969). The Petitioners therefore request this Court to depart from its historical rejection of requests by states to review state court decisions in this area. The Petitioners further seek to enmesh this Court in the field of state obscenity *legislation*, an area which this Court clearly sought to return to the states in its obscenity decisions of the summer of 1973, including *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).[2]

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[2]The Louisiana Supreme Court issued a stay of its decision which expired on February 15, 1974. Justice Dixon dissented with the comment: "The state has pointed to no case in which the *state* has been granted a stay in such a case. . ." Petitioners' Application, Appendix L, page 167a.

VII.

The Petition for Writs of Certiorari is further unmeritorious in that the United States Supreme Court has *consistently maintained that it is without power to construe state legislation in this area. United States v. v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Gooding v. Wilson*, 405 U.S. 518, 521 (1972); *United States v. Twelve 200-Foot Reels of Film*, 413 U.S. 123, 93 S.Ct. 2665, 41 U.S.L.W. 4963, n. 7 (1973); *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Cf. Coleman v. Alabama*, 399 U.S. 1 (1970). In *Thirty-Seven Photographs*, this court concluded: "[W]e lack jurisdiction authoritatively to construe state legislation." 402 U.S. 363, at 369. And, in refusing to construe a Georgia statute in *Gooding v. Wilson*, 405 U.S. 518 (1972), this Court concluded: "Only the Georgia courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.'" *Id.* at 520. And, in a companion case to *Miller*, this court recently restated: "[W]e must leave to the state courts the construction of state legislation. . ." *12 200-Ft. Reels of Super 8mm Film, et al.*, 413 U.S. 123, 41 U.S.L.W. 4963, n. 7. Therefore, by this Court's own consistent principles, the construction placed upon the Louisiana Obscenity Statutes by the Louisiana Supreme Court is final and binding upon this Court. The Louisiana Supreme Court has construed these statutes to be vague, overbroad and violative of the Louisiana and United States Constitutions.

VIII.

The Respondents fail to see the existence of any federal constitutional questions where a state supreme court concludes that state statutes are invalid because they violate both the State Constitution and the Constitution of the United States. And, in any event, the adequate state grounds for these decisions make review by certiorari inappropriate. *See, Monger v. Florida, cert. denied,* 405 U.S. 958, 92 S.Ct. 1163 (1972), *McKinney v. City of Birmingham, cert. denied,* 409 U.S. 895 (1972) and *Holden v. Arnebergh, appeal denied,* 394 U.S. 102, 89 S.Ct. 926 (1969). As stated by this Court in *Henry v. Mississippi,* 379 U.S. 443, 446, 85 S.Ct. 564, 567: "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest upon independent and adequate state grounds, even where those judgments also decide federal questions."

The Unconstitutionality of Louisiana Revised Statute 14:106(A), the Criminal Obscenity Statute

In *State of Louisiana v. Shreveport News Agency, Inc.*, 287 So.2d 464 (1974) (also reported as Appendix M, p. 174a of Petitioners' Application), the Louisiana Supreme Court concluded that La. R.S. 14:106, the Criminal Obscenity Statute, is unconstitutional on its face. The statute at issue reads:

"Obscenity is the intentional:

(1) .....

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any *lewd, lascivious, filthy or sexually indecent* written composition, printed composition, book, magazine, pamphlet, newspaper. . .

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person.

(4) ....."

La. R.S. 14:106(A)
(Emphasis supplied)

In reviewing this statute, the Louisiana Supreme Court noted:

"We must decide the constitutionality of our statute under the latest pronouncement by the United States Supreme Court. The principle case which affects our decision is *Miller v. California. . .*" 287 So.2d at 467.

That Court took special note of the majority opinion in *Miller* concluding that "the United States Supreme Court in *Miller* laid down new tests for determining obscene material which could statutorily be controlled . . ." 287 So.2d at 467. This Court in *Miller* stressed the need for clarity and precision in the obscenity legislation when, speaking for the majority, Chief Justice Burger stated:

> "The dissent of Mr. Justice Brennan reviews the background of the obscenity problem, but since the court now undertakes to formulate standards *more concrete* than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions." 93 S.Ct. at pp. 2612-13.
>
> * * * *
>
> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. *State statutes designed to regulate obscene materials must be carefully limited* . . . As a result, we now confine the permissible scope of such regulations to works which depict or described *sexual conduct. That conduct must be specifically defined by the applicable state law,* as written or authoritatively construed."
>
> * * * *

> "The basic guidelines for the trier of fact must be: . . . (b) whether the work depicts or describes, in a patently offensive way, *sexual conduct specifically defined by applicable state law. . .*"
>
> * * * *
>
> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless the materials depict or describe patently offensive '*hard core*' sexual conduct *specifically defined by the regulating state law* as written or construed." *Id.* at pp. 2614-15 (emphasis added).

Citing the language of *Miller* requiring specificity in obscenity legislation, the Louisiana Supreme Court concluded:

> "Thus it must be obvious, even to laymen and surely to this Court, that R.S. 14:106(2) does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California." 287 So.2d at 468.
>
> "[W]e conclude that R.S. 14:106(2), as considered and interpreted in light of Miller v. California, is over-broad, too general, and without the required specificity to withstand the constitutional attack under the U-

nited States Constitution. . . and our [Louisiana] Constitution. . ." 287 So.2d at 470.

The Unconstitutionality of La. R.S. 13:4711, et seq., The Louisiana Nuisance Statute

The Louisiana Supreme Court concluded that the Louisiana Nuisance Statute, La. R.S. 13:4711 et seq., was unconstitutional *on its face* as a matter of law. The Petitioners, in contrast, argue to this Court the facts giving rise to this litigation, which were not the basis of the Louisiana Supreme Court's opinion, and are irrelevant to their Petition for Certiorari.

Petitioners would have this court believe, in direct contravention to the findings and holdings of the Supreme Court of Louisiana, that the Louisiana Nuisance Statute is somehow valid on its face. On pages 58 and 59 of Petitioners' Application, we find listed six reasons Petitioners say the Louisiana Nuisance Statute provided Respondents with "First Amendment protection", and we submit the following in response to those assertions.

Petitioners say:

"1. Before the issuance of a temporary injunction, affidavits were presented to a District Court Judge alleging in *great detail* the obscene nature of the movie and the trial judge was able to make the *judicial determination* that a temporary injunction should issue."

The Supreme Court of Louisiana held to the contrary when it found that the Louisiana Nuisance Statute:

(a) mandates the issuance of a temporary injunction without a judicial finding of probable cause;

(b) provides no standard for issuance of that ex parte injunction;

(c) provides, in a civil nuisance proceeding, for a prior restraint without notice or hearing; and

(d) constitutes a prior restraint on future expressions.

See Gulf States Theatres of Louisiana, Inc., et al v. John A. Richardson and George W. D'Artois, 287 So.2d 480 (Petitioners' Application, Appendix J, page 126a et seq.).

Petitioners say:

"2. The temporary injunction remained in effect for a period of five days as to *this obscene movie only*, with respondents place of business being allowed to continue to operate with 'business as usual,' the only exception being that the obscene movie 'The Stewardesses' was not shown."

The Supreme Court of Louisiana held to the contrary, when it found the Louisiana Nuisance Statute:

(a) provides for the closing of the building for one year; and

(b) causes a deprivation of property without due process of law.

As noted by the Supreme Court of Louisiana ". . . *a statute which is unconstitutional on its face cannot be constitutionally enforced.*" *Gulf States Theatres of Louisiana, Inc., et al v. John A. Richardson and George W. D'Artois, supra.* The Petitioners concentration upon the facts as they occurred is misguided in that the true legal issue is the potential for abuse of a statute affecting First Amendment freedoms. *A statute which on its face is susceptible of being applied to constitutionally protected speech is unconstitutionally overbroad and cannot be constitutionally applied. Gooding v. Wilson,* 405 U.S. 518; *Grayned v. City of Rockford,* 408 U.S. 104.

Petitioners say:

"3. At the trial on the merits conducted within five days, the burden of proof was upon the plaintiff and that burden of proof was maintained."

The Supreme Court of Louisiana noted the procedural requirements of *Freedman v. Maryland,* 280 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), one of which

is that the burden of proving a film is unprotecte expression must rest on the censor, and not on th accused. In light of the "rule nisi" procedure com manded by the statute, it is therefore unconstitutiona on its face and cannot be constitutionally enforce

Petitioners say:

> "4. The decision by the trial court that the movie was, in fact, obscene, was handed down at the conclusion of the trial, on the same day thereof, within five days from the date of the filing of the original suit."

The Supreme Court of Louisiana held that the sta ute on its face failed to provide for prompt adversa hearing or a specific time in which a decision shou be made by the trial court.

With all respect to the trial court, the decision fin ing the movie "The Stewardesses" obscene by th tribunal meant little in that the court did not even vie the movie. The trial court's decision granting the pe manent injunction prohibiting the showing of the mov was merely the rubber stamping of the self-appointe censors' action in obtaining the temporary restrainin order five days earlier. Respondents simply were n granted the due process procedural rights to whic they were entitled, and a review of the trial court re ord, we submit, leads the reader to no other concl sion.

Petitioners say:

> "5. Respondents were granted an appeal to the Louisiana Second Circuit Court of Appeal as a matter of right."

As did the Court of Appeal of Louisiana, Second Circuit, some five months after trial the Supreme Court of Louisiana declared the Louisiana Nuisance Statute unconstitutional in that it failed to provide for a prompt appeal.

Petitioners say:

> "6. The theatre itself has not been closed but has, as stated above, continually operated since the date of filing of suit."

The Supreme Court of Louisiana held, to the contrary, that the statute, *on its face*, provides for the closing of the building for one year and causes a deprivation of property without due process of law.

The colloquy among the court and counsel at the conclusion of the trial court hearing, and the threat communicated by the trial judge, shows an additional reason why Respondents could take little solace in the fact they were allowed to continue operating at the theatre in question.

> "THE COURT: No, I am not holding that. I am holding that the showing of this movie is in violation of the statute. Now if they show

another movie and you come back in, showing that, then I think that possibly we would be justified in going ahead and doing what you are asking to be done in this case, closing the business for a year.

* * *

"THE COURT: Well, I am just telling you, Mr. Carmody, if you come back, I am going to close you for a year. You understand?

(Excerpts from Trial Court's Opinion found at Appendix B to Petitioners' Application, page 10a).

CONCLUSION

The Louisiana Supreme Court has held that the Civil Nuisance Statute and the Criminal Obscenity Statute are unconstitutional on their face in light of *Miller v. California*, and its companion cases. It is respectfully submitted that, for the reasons stated herein, the Petition for Writs of Certiorari should be denied.

Respectfully submitted,

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May 1, 1974

CERTIFICATE

This is to certify that I have this day served upon opposing counsel the within and foregoing Brief in Opposition to Petition for Writs of Certiorari to the Supreme Court of Louisiana, by mailing three (3) copies thereof, postage prepaid, to William J. Guste, Jr., Attorney General of Louisiana, State Capitol Building, Baton Rouge, Louisiana 70804, John A. Richardson, District Attorney, First Judicial District of Louisiana, 501 Caddo Parish Courthouse, Shreveport, Louisiana 71101, Harry Connick, District Attorney, Orleans Parish, State of Louisiana, 2700 Tulane Avenue, New Orleans, Louisiana 70119, this ____ day of April, 1974.

Of Counsel